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In the Supreme Court
of the United States

OCTOBER TERM, 1972

No. 72-305

WILLIAM ARVIDSON, et al,

Petitioners,

v.

DILLINGHAM CORPORATION, a corporation doing business under the assumed business name of ALBINA ENGINE & MACHINE WORKS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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I

OPINIONS BELOW

The opinion of the District Court (App. A of Petition) has not been reported. The opinion of the Court of Appeals for the Ninth Circuit (App. B of Petition) also has not yet been reported.

II

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

III

QUESTION PRESENTED

Whether shipyard workers, injured while painting a new partially constructed barge owned by the shipyard, can sue their employer-bargeowner for negligence in failing to provide a safe place to work, notwithstanding their receipt of compensation from their employer under the State Workmen's Compensation Act.

IV

STATUTES INVOLVED

Petitioners have received compensation payments under the Oregon Workmen's Compensation Act, ORS 656.001 et seq. The only provisions of that statute here pertinent are ORS 656.018(1) and (2) which provide in part:

> "(1) Every employer who satisfies the duty required by subsection (1) of ORS 656.016 [the duty to provide workmen's compensation coverage] is relieved of all other liability for compensable injuries to his subject workmen, the workmen's beneficiaries and anyone otherwise entitled to recover damages from the employer on account of such injuries....

"(2) The rights given to a subject workman and his beneficiaries for compensable injuries under ORS 656.001 to 656.794 are in lieu of any remedies they may otherwise have for such injuries against the workman's employer under ORS 654-.305 to 654.335 or other laws, common law or statute . . . ."

Petitioners have never received any benefits under the federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. However, Section 5 of that Act, 33 U.S.C. § 905, contains an "exclusive liability" provision analogous to that in the Oregon law, and the effect of that Section is treated in the admiralty cases here pertinent. Section 5 provides in part:

"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee . . . may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

V

STATEMENT

Respondent accepts the statement of the case as set forth in the Petition, with the exception of the references to "marine railway" at Page 4 of the Petition. The way upon which respondent's barge was being constructed when the injury occurred was not a "marine railway" but only a "launching way" used in the construction of new vessels.

VI

ARGUMENT

The Ninth Circuit's Ruling Does Not Conflict with Applicable Supreme Court Decisions But, on the Contrary, is in Complete Harmony with Those Decisions.

The sole issue in this case is whether shipyard workers injured while painting a new partially completed barge owned by the shipyard can sue their employer-barge owner for negligence, notwithstanding their receipt of compensation from their employer under the State Workmen's Compensation Act.

No United States Supreme Court case has ever so held. Petitioners' position, unique in admiralty law, that a direct negligence action does lie against the employer is therefore based on a tortured construction of three Supreme Court decisions: *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406 (1953), *Reed* v. *S.S. YAKA*, 373 U.S. 410 (1963), and *Jackson* v. *Lykes Bros. Steamship Co.*, 386 U.S. 731 (1967). None of those

cases, taken separately or together, offer any support for petitioners' strained contention.

Pope & Talbot, Inc. v. *Hawn* allowed a negligence action by a carpenter, employed by an independent contractor, against a *third party ship owner*. This has always been the law. See cases cited in *Hawn*, 346 U.S. at 413-14, n. 6. Such a decision is, however, irrelevant to the case at bar, where employees are directly suing their *employer* for alleged negligence, even though they have been compensated by the employer under the State Workmen's Compensation Act.

Reed v. *S.S. YAKA* held that a bareboat charterer owed a warranty of seaworthiness to a longshoreman employed by the charterer, even though another company was the title owner of the ship. The Court treated the charterer as the owner of the vessel *pro hac vice:*

> "... [O]nly blind adherence to the superficial meaning of a statute could prompt us to ignore the fact that Pan-Atlantic was not only an employer of longshoremen but was also a bareboat charterer and operator of a ship and, as such, was charged with the traditional, absolute, and non-delegable obligation of seaworthiness which it should not be permitted to avoid. ..." 373 U.S. at 415.

Using this rationale, the Court also held that the "exclusive liability" provision of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905 (which is analogous to that found in the Oregon Act here involved), did not prevent the

employee from suing his employer for *unseaworthiness*, because the employer was also the *owner* of the vessel. The Court in so deciding thus rejected the contention that "petitioner must be completely denied the traditional and basic protection of the warranty of seaworthiness simply because Pan-Atlantic was not only the owner *pro hac vice* of the ship but was also petitioner's employer." 373 U.S. at 414.

Jackson v. *Lykes Bros. Steamship Co.* followed *Reed* and held that a longshoreman employed on a ship, whether by an independent contractor or by the shipowner, can recover against the shipowner for *unseaworthiness*, notwithstanding Section 5 of the Longshoremen's Act.

Reed and *Jackson* held, therefore, that an employee can sue a shipowner for its breach of *warranty of seaworthiness* even though the shipowner was also the employer and had compensated the employee under the applicable compensation act. But the fact that Section 5 does not prevent an employee from suing an employer-shipowner for unseaworthiness in no way supports petitioners' contention that he could sue for negligence, as unseaworthiness and negligence are two entirely distinct concepts. The distinction between unseaworthiness and negligence was emphasized in the Ninth Circuit's opinion. Quoting from *Unser* v. *Luckenbach Overseas Corp.*, 400 U.S. 494, 498 (1971), the Court of Appeals stated:

> ". . . [T]he Court has repeatedly taken pains to point out that liability based upon unseaworth-

iness is wholly distinct from liability based upon negligence. The reason, of course, is that unseaworthiness is a *condition*, and how that condition came into being—whether by negligence or otherwise—is quite irrelevant to the owner's liability for personal injuries resulting from it." (App. B of Petition, pp. 23-24).

This fundamental difference is manifested in the purpose behind the state and federal compensation statutes. Those statutes were designed not to protect shipowners from unseaworthiness suits, but to protect employers from negligence actions brought by their employees. The Oregon Workmen's Compensation Act, ORS 656.001 et seq., was enacted to *replace* the employer's common law liability to employees for *negligence*, and in its stead provided the employee an exclusive remedy of compensation without regard to employer negligence. *See, e.g., Johnson* v. *Timber Structures, Inc.*, 203 Or. 670, 678, 281 P.2d 723 (1955). The same is true of the federal Longshoremen's Compensation Act, through which Congress displaced the longshoremen's right to sue their employer for negligence. *Pope & Talbot, Inc.* v. *Hawn, supra*, 346 U.S. at 415 (concurring opinion of Mr. Justice Frankfurter). To accept the petitioners' argument in the instant case and allow employee negligence actions against the employer would be tantamount to repealing the federal and state compensation acts which were enacted to protect the employer from such suits for reasons of public policy. Any such repeal should be the job of the legislature, not the Supreme Court.

The Ninth Circuit, in affirming the District Court's granting of defendant's motion for summary judgment, followed the pertinent decisions of this Court. Indeed, for the Court of Appeals to have held otherwise would have been a severe departure from these decisions. In such a case the grant of a *writ of certiorari* would be warranted to remedy such a complete departure from the existing law. However, the Court of Appeals, after carefully applying the *Reed* and *Jackson* cases, in fact concluded its opinion as follows:

> "Where the employer is also a shipowner, Section 5 does not preclude an action for unseaworthiness, but we find nothing in any of the decisions of the Supreme Court to suggest that this additional right of recovery would be extended to an action for negligence."

This is correct. The right of an employee receiving compensation to sue his employer for direct negligence was not even at issue in *Hawn*, *Reed* or *Jackson*, much less recognized. Petitioners' argument that those cases established such a right, while necessarily imaginative, is completely unfounded in law. There is nothing in any Supreme Court decision to support petitioners' argument, and petitioners' desperate interpretations of *Hawn*, *Reed* and *Jackson* are of no avail. There is absolutely no conflict with Supreme Court decisions, and the petition must be denied.

B

The Ninth Circuit's Decision Does Not Conflict in Principle with Decisions of This Court or of Other Courts of Appeal.

Petitioners correctly state that other circuits have uniformly sustained the right of shipyard workers employed by independent contractors to recover for the negligence of shipowners as an independent ground of recovery. This was also the result in *Pope & Talbot* v. *Hawn, supra.* Petitioners also state (citing *Reed* and *Jackson,* both *supra*) that "this Court and other circuits have held that shore-based workers may proceed against their employers, if such employers are also the owners of the vessels on which such workers were injured, notwithstanding the provisions of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act." (Petition, p. 11). Petitioners then make the same fallacious argument as before, that *Jackson* coupled with *Hawn* "can leave no doubt that this Court intended to afford these petitioners a right to recover on a negligence theory" (*Id.*). They claim that "in principle" there is no valid distinction between this case and *Hawn* and *Jackson,* since they would admittedly have a right to sue the shipowner for negligence if they had been hired by an independent shipyard.

Again, this argument fails to recognize the realities of the situation. True enough, *Hawn* did allow a carpenter to sue an independent third party shipowner for negligence, and *Reed* and *Jackson* did allow long-

shoremen to sue their employer-shipowners notwithstanding the "exclusive liability" provisions of Section 5. However, petitioners conveniently de-emphasize the facts that in *Hawn*, unlike here, the negligence suit was not against the petitioner's employer, and that the additional remedy allowed in *Reed* and *Jackson* was for breach of warranty of seaworthiness, not for negligence. Petitioners completely misunderstand, or wilfully disregard, the fundamental differences between shipowner and employer on the one hand, and unseaworthiness and negligence on the other, which are, of course, the crucial factors distinguishing this case from *Hawn*, *Reed* and *Jackson*. Were petitioners suing respondent for breach of a *shipowner's* warranty of seaworthiness, Section 5 would be no bar; however, they are seeking to sue respondent as an *employer* (not as an independent third party as in *Hawn*) for negligence in failing to provide a safe place to work. As such they are precluded by Section 5. This is only logical, because, as mentioned, the state and federal compensation acts were enacted for the very purpose of protecting employers from negligence actions by their employees. For this Court to accept the petitioners' argument would be to repeal those statutes by judicial action.

That the above analysis is well founded in reason is evidenced by the complete uniformity of decisions dealing with the subject, all of which have correctly read *Jackson* as applying solely to employee *unseaworthiness* claims. *Manning* v. *M/V SEA ROAD*, 417 F.2d 603 (5th Cir. 1969); *Atkins* v. *Greenville Ship*

Building Corp., 411 F.2d 299 (5th Cir. 1969); *Vantrease* v. *United States*, 400 F.2d 853 (5th Cir. 1968); *Miller* v. *United States*, 307 F. Supp. 932 (E.D. Va. 1969); *Storey* v. *Garrett Corp.*, 43 F.R.D. 301 (C.D. Cal. 1967).

In short, there is no conflict whatsoever between the instant decision and those of the Supreme Court or of other circuits, either in fact or in "principle." On the contrary, there is complete unanimity among the courts in the rejection of petitioners' contention. There is no dispute or confusion between the circuits; there is no federal question requiring clarification; there is no need for direct adjudication by the Supreme Court. The petition must be denied.

VII

CONCLUSION

Petitioners, having received workmen's compensation benefits under the Oregon Workmen's Compensation system, seek to overturn the statutory protection given to employers against direct negligence actions by their employees. Petitioners are unable to cite any authority granting them this remedy, nor can they create such a remedy by far-reaching interpretations and strained extrapolations from existing Supreme Court decisions. All the pertinent cases uniformly reject petitioners' attempt to judicially repeal the statutory protection scheme. The Ninth Circuit adhered to this position, and in so doing has preserved the unanimity among the courts regarding the issue

here presented. The petition for writ of certiorari should be denied.

Respectfully submitted this 22nd day of September, 1972.

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